SUBJECT INDEX

PETITION

BRIEF

LIST OF CASES

IN THE

Supreme Court of the United States

October Term, 1923

No. ———

MODERN WOODMEN OF AMERICA,
Petitioner,

vs.

JENNIE VIDA MIXER,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

The petition of the Modern Woodmen of America respectfully shows:

I.

The petitioner, the Modern Woodmen of America, is a fraternal beneficiary corporation organized in 1883 under the laws of Illinois, and was and is organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system with ritualistic form of work and representative form of government, and makes provisions for the payment of benefits to the beneficiaries of deceased members subject to compliance by its members with its constitution and laws (Rec., p. 21).

II.

The petitioner for more than twenty-five years last past has been duly admitted to transact business in Nebraska as a fraternal beneficiary society, and in its entire jurisdiction has more than a million members to whom benefit certificates have been issued (Rec., pp. 22, 44).

III.

On the 18th day of November, 1901, Walter Crocker Mixer became a member of a subordinate body of the petitioner pursuant to a written application for membership, and received a benefit certificate in favor of the respondent, his wife, in the sum of Two Thousand Dollars ($2,000.00) (Rec., p. 4).

IV.

The petitioner's by-laws duly and regularly enacted and in full force and effect at all times from and after the first day of September, 1908, have provided as follows:

> "Sec. 66. *Disappearance No Presumption of Death.*—No lapse of time or absence or disappearance on the part of any member, heretofore or hereafter admitted into the Society, without proof of the actual death of such member, while in good standing in the Society, shall entitle his beneficiary to recover the amount of the Benefit certificate, except as hereinafter provided. The disappearance or long continued absence of any member unheard of, shall not be regarded as evidence of death or give any right to recover on any Benefit certificate heretofore or hereafter issued by the Society until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality has expired within the life of the Benefit certificate in question and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term "within the life of the Benefit certificate,' as here used, means that the Benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the Society have been made" (Rec., p. 28).

V.

Under petitioner's charter granted by Illinois, the public acts and statute law of Illinois as it existed at all times subsequent to the year 1893, it had the right and power to

adopt, alter, revise and amend its by-laws, and the by-laws so enacted became a valid and existing part of the contract between the petitioner and the members, including Walter Crocker Mixer, and Section 66 of petitioner's by-laws so enacted as aforesaid, was and is a valid and existing part of the contract between the petitioner and the member, Walter Crocker Mixer, and binding on his beneficiary, the respondent (Rec., p. 29).

VI.

Proceedings in Trial Court

The respondent began this action in the District Court of Dakota County, Nebraska, on the 7th day of October, 1921, alleging in her complaint that the petitioner issued to her husband, Walter Crocker Mixer, a Benefit certificate in the sum of Two Thousand Dollars ($2,000.00), dated November 18, 1901, and that the petitioner promised to pay to respondent, as beneficiary, on the death of her husband the sum of $2,000.00; and that her husband, Walter Crocker Mixer, had been absent from his home and place of residence for over seven years last past, and that his absence had been continuous and unexplained, and that by reason of his absence he was presumed to be dead (Rec., p. 4).

VII.

The petitioner duly filed its answer in this case, setting out that it was a fraternal beneficiary society, incorporated under the laws of Illinois and authorized to do business in Nebraska, and was carried on for the sole benefit of its members and their beneficiaries and not for profit, having a lodge system with ritualistic form of work and representative form of government, and made provision for payment of benefits subject to compliance by its members with its constitution and laws, and alleged that its by-laws, duly and regularly enacted and in full force and effect at all times from and after the first day of September, 1908, included By-law No. 66 set out on page 2 herein. And the by-

law heretofore set out was expressly authorized by and adopted pursuant to the terms of the contract between the parties, which included the statutes of Illinois, the charter, by-laws, application and Benefit certificate. The answer of the petitioner then sets forth certain judicial proceedings had in the courts of the State of Illinois as a basis for the plea which follows that such proceedings, involving as they do a construction by the courts of Illinois of the identical by-law in question in this case, are binding on the courts of Nebraska as to such construction under the full faith and credit doctrine found in Section 1, Article 4, of the Constitution of the United States. Such judicial proceedings are stated thus: On the 13th day of December, 1917, one Louisa W. Steen filed an action at law against this petitioner in the Superior Court of Cook County, Illinois, and in her declaration for cause of action, alleged that on the 15th day of January, 1897, this petitioner issued a certain Benefit certificate to one Albert F. Steen, payable on his death in the sum of $2,000 to Louisa W. Steen, his wife as beneficiary. That on the 7th day of May, 1910, said Albert F. Steen disappeared from his home in the city of Chicago, Illinois, and his absence had continued seven years, and was presumed to be dead, and the said Louisa W. Steen prayed judgment for the sum of $2,000. The petitioner herein, defendant therein, on January 9, 1918, filed a special plea to plaintiff's declaration, alleging that it was a fraternal beneficiary society, that the suit was founded on the contract entered into between Albert F. Steen and the petitioner, which consisted of the application for membership, the Benefit certificate, the by-laws, rules and usages of the society then in force or thereafter enacted, and admitted that the Benefit certificate had been issued to Albert F. Steen for the sum of $2,000; and the plea further alleged that the by-laws of petitioner in force when said Benefit certificate was issued were subsequently amended and modified, and from and after September 1, 1908, the by-laws contained Section 66 as hereinbefore set forth; and the plea concluded with the allegation that

proof of the actual death of Albert F. Steen had never been furnished to the petitioner, and the natural expectancy of life of Albert F. Steen, according to the National Fraternal Congress Table of Mortality, had not expired. That on the 7th day of February, Louisa W. Steen filed a demurrer to petitioner's said plea, alleging that said plea was not sufficient in law to constitute a defense to her action, and thereafter on the first day of June, 1918, the Superior Court of Cook County, Illinois, entered an order overruling the demurrer to the special plea, holding that said by-law was valid and that Louisa W. Steen could not maintain her action. Louisa W. Steen refused to plead further and elected to stand on her demurrer to the special plea. That the action was appealed to the Appellate Court of the First District of Illinois, which court, on the third day of April, 1920, entered an order and judgment affirming the judgment of the Superior Court of Cook County, Illinois. That Louisa W. Steen perfected her appeal in the Supreme Court of Illinois, which is the highest judicial tribunal of Illinois, and on the 20th day of December, 1920, the Supreme Court of Illinois filed an opinion in the case of *Louisa W. Steen vs. Modern Woodmen of America,* 296 Ill. Rep. 104, a full copy of which opinion was made a part of the answer and is found in the record, page 39, whereby the Supreme Court of Illinois affirmed the judgment of the Appellate Court of the First District of Illinois, and held that By-Law 66 is a valid by-law and a valid and existing part of the contract and binding upon the members of this petitioner and their beneficiaries. Thereafter a petition for rehearing was filed in the Supreme Court of Illinois, which petition for rehearing was overruled on February 3, 1921. That the opinion thereupon became final and judgment was thereupon entered in the Supreme Court of Illinois affirming the judgment in favor of this petitioner. The answer in this case further alleged that the constitution and by-laws of this petitioner and the contract rights between this petitioner and its members, and the authority and power of this petitioner under its charter

and the statute law of Illinois, as passed upon by the Superior Court of Cook County, Appellate and Supreme Courts of Illinois, in the case of Steen against the petitioner, are the same as in this case; that the question involved in this case is whether petitioner had the power to enact Section 66 of petitioner's by-laws and is a valid by-law and binding upon the members of the corporation and their beneficiaries, and this is identically the same question which was determined by the Superior Court of Cook County, Appellate and Supreme Courts of Illinois, in the Steen case aforesaid. The said answer further alleged that the validity of Section 66, set out above, was concluded by the aforesaid judgment of the Superior Court of Cook County, Appellate and Supreme Courts of Illinois, and that under Section 1, Article 4 of the Constitution of the United States it was the duty of the trial court to give full faith and credit to the statute law of Illinois, and the judgment of the Superior Court of Cook County, Appellate and Supreme Courts aforementioned in the case of *Steen vs. Modern Woodmen of America* (Rec., pp. 29, 30, 31, 32, 33).

VIII.

The respondent demurred to the petitioner's answer which was by the District Court of Dakota County, Nebraska, sustained, to which the petitioner at the time duly excepted. The filing of the demurrer admits all the facts pleaded in the answer. The petitioner refused to plead further and the defense set forth in petitioner's answer was dismissed, to which ruling of the court the petitioner at the time excepted. The trial court entered judgment for the amount claimed in respondent's petition. An appeal was taken to the Supreme Court of Nebraska and the judgment of the District Court was affirmed. The Supreme Court filed no opinion other than to say that it based its ruling upon the cases of *Garrison vs. Modern Woodmen of America,* 105 Neb. 25; *Coverdale vs. Royal Arcanum,* 193 Ill. 91, and *Boynton vs. Modern Woodmen of America,* 148 Minn. 150 (Rec., p. 104). The Supreme Court omitted in its

opinion any mention of the binding force of the judgment of the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America*, and its interpretation of the powers of petitioner under its charter, although this judgment was pleaded in the petitioner's answer and the failure of the trial court to recognize the holding in the Steen case which was discussed at length both in the oral argument and in the written brief in the Supreme Court, it being in fact the only question raised by petitioner (Rec., p. 33).

IX.

Reasons for the Allowance of the Writ

The courts of Illinois have sustained petitioner's by-law and held that the adoption of the by-law, which has been hereinbefore set out, was within the power of the corporation as given to it by its charter issued by Illinois and the statutes of Illinois relating to fraternal beneficiary societies. The by-law in question was merged in the contract between the petitioner and Walter Crocker Mixer, and the real question decided by the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America* was that the petitioner, defendant therein, had the power under its charter and the statute of Illinois to enact this by-law, which relates to a rule of evidence.

This same doctrine was announced in the case of *Wisconsin vs. Pelican Insurance Co.*, 127 U. S. 265, in the following language:

> "The provisions of the constitution and of the Act of Congress by which the judgments of one state are to have faith and credit given to them in another state established a rule of evidence rather than of jurisdiction. They do not affect the jurisdiction of the Court in which the judgment is rendered or of that in which it is offered in evidence."

The ruling on the demurrer to the answer in the trial court was of the same effect as if the judgment in the Steen

case had been offered in evidence and excluded by the trial court.

The petitioner having been organized and chartered under the laws of Illinois it follows that on all matters which relate to its power to do a given act, such as the adoption of the by-law hereinbefore set out, is to be determined by the courts of that state, the domicile of the corporation. Wherever a corporation goes to transact business it carries with it its charter and the interpretation of the power of that charter by the courts of the state where the corporation is organized. The District Court of Dakota County and the Supreme Court of Nebraska failed to give full faith and credit to the judgment in the case of *Steen vs. Modern Woodmen of America, supra*, by not following the conclusion reached in that case as to the power of petitioner under its charter and the laws of Illinois.

If the judgment rendered in the case of *Steen vs. Modern Woodmen of America* by the Supreme Court of Illinois is not controlling as to the power of the corporation to enact By-Law 66 relating to disappearance of members, then the funds of the Society would be distributed by one rule in Illinois and by another rule in Nebraska. Chief Justice White, in the case of *Royal Arcanum vs. Green*, 237 U. S. 531, said in substance that a fund which was distributed by one rule in one state and by a different rule somewhere else would, in effect, amount to no distribution.

The legislature of Nebraska has not deemed it advisable to limit the charter powers of foreign fraternal beneficiary societies by providing that such fraternal beneficiary societies may not contract in reference to a rule of evidence. Until the legislature makes invalid the right of a fraternal beneficiary society to contract with reference to a rule of evidence the power of the petitioner as set forth in its charter, and interpreted by the courts of Illinois, is unimpeached and paramount, and the failure of the District Court of Da-

kota County and of the Supreme Court of Nebraska to recognize the controlling effect of the judgment rendered by the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America* was the failure of the courts to give full faith and credit to the public acts, records and judicial proceedings of Illinois, and to the judgments and decisions of the highest tribunal of Illinois, the place of petitioner's incorporation and domicile, in construing the validity of By-Law 66, and this is a violation of Section 1, Article 4 of the Constitution of the United States.

X.

The petitioner presents herewith a brief showing more fully its views upon the questions involved, and a certified copy of the record of said cause including the proceedings of the Supreme Court of Nebraska.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Nebraska, commanding said court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said court in said cause entitled *Jennie Vida Mixer, Appellee vs. Modern Woodmen of America, Appellant*, to the end that the said cause may be reviewed and determined by this Court as provided by law, and your petitioner prays that the judgment of said Supreme Court of Nebraska in said cause be reversed by this Honorable Court.

MODERN WOODMEN OF AMERICA,
Petitioner.

NELSON C. PRATT,
Counsel for Petitioner.

TRUMAN PLANTZ,
FRANK M. MCDAVID,
GEORGE G. PERRIN,
GEORGE H. DAVIS,
Of Counsel.

STATE OF NEBRASKA,
COUNTY OF DOUGLAS. } ss.

I, NELSON C. PRATT, being duly sworn, depose and say that I am one of the counsel named in the foregoing petition, that I have read the petition and know the facts therein contained and that the same are true to the best of my knowledge and belief.

NELSON C. PRATT.

SUBSCRIBED and sworn to before me this 28th day of February, 1924.

ETHEL G. MAGNEY,
[SEAL] *Notary Public.*

Counsel's Certificate of Merit

I hereby certify that I have examined and read the foregoing Petition for Writ of Certiorari; that in my opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

NELSON C. PRATT,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1923

No. ———

MODERN WOODMEN OF AMERICA,
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vs.

JENNIE VIDA MIXER,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

The Supreme Court of Nebraska decided this case without writing an extended opinion, and based its conclusion solely upon the doctrine announced in the cases of *Garrison vs Modern Woodmen of America*, 105 Neb. 25; *Coverdale vs. Royal Arcanum*, 193 Ill. 91, and *Boynton vs. Modern Woodmen of America*, 148 Minn. 150, upon the assumption that there was no distinction between these cases and the instant case. The conclusion was reached in the *Garrison case, supra,* on the grounds that the society did not have the power to enact such by-law, and that such by-law was an unreasonable invasion of the rights of the member, and consequently did not prevent the beneficiary from recovering.

The *Boynton case, supra,* decided by the Supreme Court of Minnesota, was on exactly the same issue as the one de-

cided in the Garrison case. In the *Coverdale case, supra,* the question involved was one of forfeiture and did not involve the question raised in this case.

The real question is, did petitioner have the power under its charter granted by Illinois and the statutes of Illinois to enact the by-law in question and thereby contract with refreence to a rule of evidence, as set forth in this by-law? The Supreme Court of Illinois, in the case of Steen against petitioner, held this by-law valid and its enactment within the power given it by its charter. When the petitioner came into Nebraska to transact business as a fraternal beneficiary society it brought its charter with it, and its power to do any given thing is to be determined by that charter and the interpretation of it by the courts of Illinois. If the petitioner had the power to enact this by-law under its charter as interpreted by the courts of Illinois, the domicile of the corporation, then the courts of Nebraska were bound to recognize this power and the validity of this by-law as interpreted by the courts of Illinois. The District Court of Dakota County, in failing to overrule the demurrer filed by respondent to the answer of petitioner, and the Supreme Court of Nebraska in affirming the decision of the District Court, failed to give full faith and credit to the decision and judgment of the courts of Illinois in the case of *Steen vs. Modern Woodmen of America.*

The by-law as enacted by the petitioner is valid under the interpretation of the courts of Illinois, as set forth in the case of *Steen vs. Modern Woodmen of America,* 296 Ill. 104. The question then arises, does this particular by-law, which applies to every member of the corporation and gives no advantage to one over another, and the power to enact it, as interpreted by the courts of the home state of the corporation, follow the corporation, in the transaction of business as a fraternal beneficiary society into other states?

Where either the application or benefit certificate contains an agreement on behalf of the member to be bound by after-enacted by-laws said after-enacted by-laws are valid and the member is bound thereby.

The application by the member, Mixer, as shown on page 23 of record, and the benefit certificate on page 6 of record, provide that the laws, rules and usages of the society then in force or which might thereafter be enacted, are part of the contract between the member and the society. The contract, therefore, provided that the member, Mixer, should be bound by all the laws that were legally enacted by the petitioner subsequent to the time of the issuance of his benefit certificate.

Hall vs. Association, 69 Neb. 601.
Funk vs. Stevens, 102 Neb. 681.
Supreme Lodge Knights of Pythias vs. Mims, 241 U. S. 574.
Apitz vs. Supreme Lodge, 274 Ill. 196.
Steen vs. Modern Woodmen of America, 296 Ill. 104.

The Supreme Court of Illinois in the *Apitz case, supra,* in discussing the validity of an after-enacted by-law which related to suspending a member who had been absent and unheard of for a given period, said:

> "A by-law of a mutual benefit society suspending a member who disappears is reasonable so as to be within the operation of a provision in a certificate requiring members to conform to rules subsequently adopted."

In the case of *Steen vs. Modern Woodmen of America, supra,* the court reached the conclusion that the by-law involved in this case was binding upon the member, although it was enacted after the certificate of membership had been issued.

The respondent by interposing a demurrer admitted all the allegations contained in petitioner's answer.

The petitioner elected to stand on its answer to which the demurrer interposed by respondent was sustained and

did not plead further. A general demurrer to a pleading admits all of the facts alleged and the parties so demurring must abide by the consequences which will result from such admissions.

McArthur vs. Clarke Drug Co., 48 Neb. 899.

In discussing the effect of a general demurrer to a pleading, the court, in the case of *Daily vs. Railroad*, 58 Neb. 396, said:

> "A pleading must be said to allege what can by reasonable and fair intendment be implied from its statements, and when assailed by general demurrer all it states is to be considered as admitted, and unless, when viewed in the light of the foregoing rule, there is no cause of action stated the pleading must be upheld".

The condition of the record resulting from the demurrer to the answer filed and judgment of the court thereon, is of the same effect as if a duly authenticated copy of the record of the judgment entered in the case of *Steen vs. Modern Woodmen of America, supra*, had been offered in evidence and by the court rejected.

Corporations can only exercise such powers as may be conferred by the legislative bodies creating them either by express terms or by necessary implication, and that power, whether at home or abroad, depends upon what power was given by the corporation's creator.

The rights of the respondent under the contract of corporate membership of Mixer depend upon the public acts of Illinois, the domicile of the corporation. It is not the purpose to discuss the conflict of laws as applied to actions on insurance contracts. We have no controversy with the legal principles relating to the determination of the effect given to the *lex loci contractus* in such cases.

Mutual Life Ins. Co. vs. Hill, 193 U. S. 551.
Mutual Life Ins. Co. vs. Cohen, 179 U. S. 262.

The application of the law of Illinois to the case arises from the nature of the contract regardless of the place of the contract. It would not matter in what state the contract was entered into outside of Illinois so long as it is a contract of membership in an Illinois corporation. The right arising from it will be determined by the decisions of Illinois unless such decisions are rendered invalid by an express and contrary statute of the state in which the contract is entered into.

The petitioner society was organized under the laws of Illinois relating to fraternal beneficiary societies. Whether the by-law referred to as Section 66 (as set out on page 2) having reference to disappearance cases, is valid or not depends upon the power of the legislative body of the petitioner to enact such by-law.

When the member, Mixer, joined the society he contracted to be bound by by-laws that might be enacted by the petitioner, the society having reserved the power to change the contract between the member and itself. When the petitioner society transacts business in a state other than the state in which it was incorporated it necessarily carries its charter with it, for that is the law of its existence.

The decision in the case of *Royal Arcanum vs. Green*, 237 U. S. 531, is decisive of the questions in this case, in which case the facts appear as follows:

In the case of *Reynolds vs. Supreme Council Royal Arcanum*, 192 Mass. 150, an action was brought by a member of the Royal Arcanum, a beneficiary society, to enjoin the increase of rates of assessment. The plaintiff brought the suit on behalf of himself and of others similarly situated. A decree was entered in the Reynolds case holding that the increase of rates of assessment was valid. The plaintiff, Green, sought in the Courts of the State of New York to enjoin the Royal Arcanum from enforcing the increased rates of assessment which had been determined in favor of the society in the Reynolds case. These new rates

became effective in October, 1905, and when the new rates became effective down to February, 1910, Green paid the amount of the increased assessments monthly, and did so under protest. For four years after the decision in the Reynolds case Green ceased to make the payments required by the by-laws of the corporation, and at the end of the four-year period commenced a suit in the State court of New York against the Supreme Council, assailing the validity of the increase made in the rates of assessments in 1905 on the ground that it was void as exceeding the powers of the corporation and because conflicting with his contractual rights.

The society, in the trial of that case in the state court of New York, after pleading that the decision in the Reynolds case was controlling, offered in evidence an exemplified copy of the record in the Reynolds suit in the Massachusetts Courts. An objection to the introduction of this record in evidence was sustained by the Court. This ruling was affirmed by the Supreme Court of the State of New York and the case finally reached the Supreme Court of the United States. It was claimed by the defendant Society that the action in the Reynolds case was brought on behalf of Reynolds and of others similarly situated, and that such judgment holding the rates valid was binding on all the members, no matter where situated. In discussing that question, the Supreme Court, through Chief Justice White, said:

> "A violation of the full faith and credit clause of the Constitution of the United States results from the refusal of the New York Courts to hold that the power of a Massachusetts Mutual Benefit society under its charter and by-laws so to amend such by-laws as to increase its assessment rates and the rights and duties of the members of a New York subordinate council with respect to such increase are to be determined by the Massachusetts law under which, as construed by a judgment of the highest court of that state, such amendment is valid and violates no contractual rights of the certificate holder."

In the case of *McClement vs. Supreme Court I. O. F.*, 222 N. Y. 470, the question nvolved was whether the society had the power to increase its rates of assessment. The society was organized under the laws of Canada and was transacting business in New York. The Court determined that it was unnecessary to consider whether the power to enact such by-law increasing the rates of assessment was expressly reserved by the society in the contract with the member to change his rate of assessment, because the court reached the conclusion that it had power to change the rates of assessment by the terms of its charter granted by the Parliament of the Dominion of Canada. The Court reached the conclusion expressed in the following language:

> "The charter or articles of incorporation of a beneficial association become a part of the contract of membership when one joins the association as if written therein, and a member is presumed to have joined with knowledge of their terms and conditions."

And in discussing the question whether the society had the power to increase its rates of assessment, the Court said:

> "The defendant in doing business under its charter was not only governed and controlled by it, but was subject to such modifications, restrications and repeal as should from time to time seem to Parliament to be required by the public good. This charter is carried with it wherever it goes. Every contract made by it, whether in Canada or elsewhere, is dependent upon its authority. It is true in this case that the plaintiff is a resident and citizen of the State of New York. In many respects the defendant when doing business in this state is subject to our laws, but its power to contract is dependent upon its charter."

In the Green case *supra*, the facts would have justified the Supreme Court in deciding the question on the theory that the judgment entered in the Reynolds case in the Supreme Court of Massachusetts was *res judicata* and binding on all the members of the society, including Green, who

was a resident of New York. Chief Justice White based his decision upon the theory that the courts of Massachusetts, the home of the corporation, were controlling, and as Chief Justice White stated in his opinion that the conclusion of the court did not require it to consider whether the judgment was conclusive in view of the fact that the corporation, for the purposes of the controversy as to assessments, was the representative of the members.

> "Coming then to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it, as announced by the Supreme judicial court of Massachusetts in the Reynolds case, and this conclusion does not require us to consider whether the judgment *per se* as between the parties was not conclusive in view of the fact that the corporation, for the purpose of the controversy as to assessments, was the representative of the members."
>
> *Royal Arcanum vs. Green*, 237 U. S. 531.

The case of *Hartford Life Insurance Co. vs. Ibs*, 237 U. S. 662, was decided solely on the question of *res judicata*, but it is assumed from the language used by Chief Justice White in the Green case, *supra*, that if the question of a representative suit was entirely eliminated this would not have changed the conclusion reached by the court.

The decision of the Supreme Court of Nebraska is in conflict with the case of *Hollingsworth vs. Supreme Council*, 175 N. C. 615, in which the court said:

> "It should be noted as important in the consideration of our case what Justice Holmes says in the Mims case, *supra, viz.*, that the clause providing for periodical payments of the same amount so long as the member-

ship continued, was not a contract, but was a regulation subject to the possibilities inherent in the case, and that any other view of it would create a privilege which would attack the corporation in its very life. This is the crux of the whole matter and the vital principle of the case crisply stated and sharply and lucidly defined. The Chief Justice thus concludes the opinion of the Court in *Royal Arcanum vs. Green*, in regard to the effect of the Massachusetts law and its application in other states: 'Coming then to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the Supreme Judicial court of Massachusetts in the Reynolds case.' ''

In the case of *Sovereign Comp W. O. W. vs. Wirts*, 254 S. W. (Texas) 637, the Green case, *supra*, is followed and approved. The court expressed itself among other things as follows:

"Where Nebraska was the state of incorporation of defendant insurance society, a decision of the Nebraska court that a by-law was *ultra vires* must be given effect by the courts of this state (Texas) under the full faith and credit clause of the federal constitution."

It follows that if the court had held the by-law within the power of the corporation, the Texas court would have been controlled thereby.

In the case of *Canada Southern R. R. Co. vs. Gebhard*, 109 U. S. 527, the Court, in discussing the power of a corporation, said:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (*Bank of Augusta vs. Earle*, 13 Pet. 588, 10 L. Ed. 274), though it may do business in all places where its charter allows and the local laws do not forbid. (*Railroad vs. Koontz*, 104 U. S. 12, 26 L. Ed. 643). But wherever it

goes for business it carries its charter as that is the law of its existence (*Relfe vs. Rundle,* 103 U. S. 222, 26 L. Ed. 337), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul vs. Virginia,* 8 Wall. 168, 19 L. Ed. 357); but if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign corporation, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharge it from liability there, discharges it elsewhere."

Excerpts from some of the leading cases and text books follow:

"Every corporation necessarily carries its charter wherever it goes, for that is the law of its domicile. It may be restricted in the use of some of its powers while

doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs."

Relfe vs. Rundle, 103 U. S. 222, 226.

"By subscribing to stock in a foreign corporation defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation."

Nashua Sav. Bank vs. Anglo-American Loan, Mortgage, and Agency Co., 189 U. S. 221.

"By becoming a member of a Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulation as the state might lawfully make to render the liability effectual."

Bernheimer vs. Converse, 206 U. S. 516, 533.

"A corporation seeking to invoke the doctrine of comity must be possessed of some right or privilege in the state or county of its domicile, and unless it has both existence and some right or power in such state it cannot be awarded any power in a foreign state. Its powers in another state will be measured by its charter and it will not be allowed to exercise therein any powers not conferred upon it either expressly or impliedly by its charter, or the laws of the state of its incorporation. In other words, a corporation cannot do any act beyond the limits of the state or country of its incorporation which it cannot do therein. Charter limitation on the powers of corporations follow them into every state in which they may do business. It follows that when the question for determination is the capacity or disability of a corporation in any given case, regard must primarily be had to the law of the state or sovereignty from which it has derived its franchises. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. Accordingly, where the charter of a corporation requires that its contracts or other acts shall

be executed in a particular manner, this provision must be complied with when the corporation goes into a sister state. So the laws of the state of incorporation must be consulted where the question involved is the right of the corporation to charge interest at a certain rate. Persons who deal with foreign corporations are chargeable with notice of the provisions of their charters and where they enter into contracts which are clearly *ultra vires*, neither party can maintain an action on the contract in jurisdictions which hold to the strict doctrine of *ultra vires*. A foreign corporation defending an action on the ground of *ultra vires*, should plead the statute of the state of its incorporation so that the courts of the domestic state may be informed of the limitations on its powers."

Section 6627, Thompson's second edition on Corporations.

"A foreign corporation doing business in the state brings with it the powers of its charter, unless restricted by the laws or public policy of the state, as the corporation comes as it is created, and brings its charter as the law of its existence. When a state permits a foreign corporation to come into its territory it must be presumed to have consented that the corporation should exercise all of the powers conferred by its charter and the general laws appertaining thereto, unless prohibited from so doing by the direct enactments of the state or by some rule of public policy to be deduced from the general course of legislation. An express grant in the charter of a corporation authorizing it to do business or acquire interests beyond the limits of the state in which it is created is not essential to authorize it to do such acts, but power to act outside the state may be implied. But, as is seen in the section immediately succeeding this, a corporation without power to exercise certain functions in the state of its creation is without power to exercise such functions in another state. In other words, it has no greater powers outside the state in which it was created than it has in the state of its creation."

Section 5721, Fletcher's Cyclopedia of the Law of Corporations.

In the case of *Palmer vs. Welch*, 132 Ill. 141, the Statute of Massachusetts under which the Supreme Council of the Royal Arcanum was organized, provides that such corporations may be formed for the purpose of assisting the widows, orphans, or other relatives of deceased members, or any persons dependent upon deceased members. Appellees were relatives, and came within the meaning of the law. Appellant being neither a relative, nor orphan, nor widow of deceased, nor dependent upon him, did not come within the purview of the Statute. The court said:

"We must respect the construction given to this statute by the Massachusetts courts. In *American Legion of Honor vs. Perry*, 140 Mass. 580, the Supreme Court in that state, in construing the Statute, said: 'The Statute under which the plaintiff corporation is organized gives it authority to provide for the widow, orphans, or other persons dependent upon deceased members, and further provides that such fund shall not be liable to attachment. The classes of persons to be benefited are designated and the corporation has no authority to create a fund for other persons than the classes named. The corporation has power to raise a fund payable to one of the classes named in the Statute, to set it apart, to await the death of a member, and then to pay it over to the person or persons of the class named in the Statute, selected and appointed by the member during his life, and if no one is selected it is still payable to one of the classes named."

"The contract between a fraternal benefit society and its members, evidenced by the application and certificate, is to be construed in accordance with the laws of the state in which the society was incorporated, and in which its certificates of membership are issued, as well as in accord with the charter and general laws of the society."

Supreme Lodge vs. Hine, 82 Conn. 315.

"While the contract was a Connecticut contract, it was conditioned upon the laws of the Society, and its laws, so far as valid, were in harmony with, and all

of its contracts included the statute law of the state of its origin relating to fraternal benefit societies."

Supreme Colony vs. Towne, 87 Conn. 644.

The society last above mentioned was organized under the laws of Massachusetts and had subordinate bodies called Colonies in other states, under its jurisdiction. The Court reached the conclusion that it was a Connecticut contract but that the laws of the state where the society was incorporated were controlling.

The right of a corporation to modify the terms of a contract of a corporate membership in it depends upon the power of the corporation.

Where, as in this case, there is an express and clear reservation of the right to amend, the member is bound to take notice of the existence and effect of that reserved power. The power to enact a by-law generally is inherent in every corporation as an incident to its existence. Whether or not a corporation has power to enact a particular by-law depends in a large measure upon the provisions of its charter and the laws under which the corporation is organized. The right of the beneficiary does not extend beyond the right of the member; in other words, the beneficiary possesses only such rights as the member possesses.

In the case of *Supreme Lodge K. of P. vs. Knight*, 117 Ind. 489, the court, in discussing this question, said:

"It is enough for us to affirm this proposition; and that we may safely do, both upon principle and authority, without attempting to define what greater rights, if any, the beneficiary has than those of the assured. We do not doubt that both the assured and the beneficiary have a right that is in its nature a vested one, but it is not an unqualified vested right. On the contrary, it is qualified and limited in a great degree. It is a right subject to the limitations, conditions, and restrictions of the charter and the by-laws which are factors of the contract."

In discussing the right to amend by-laws which relate to the power of a fraternal beneficiary society, the Supreme Court of the United States, in the case of *Wright vs. Minnesota Mutual Life Insurance Co.*, 193 U. S. 657, said:

> "In the present case we have, by express stipulation, the right to amend the articles, with the reservation noted as to Article 10. Nor does it appear that the changes were arbitrarily made without good and substantial reason. The testimony in this record discloses that the experience of this assessment insurance company was not anomalous or unusual. It was a case of history repeating itself. Insurance payable from assessments upon members may begin with fine prospects but the lapse of time, resulting in the maturing of certificates and the abandonment of the plan for other insurance by the better class of risks, has not infrequently resulted in so increasing assessments and diminishing indemnity as to result in failure. The testimony that such was the history of this enterprise is ample. The changes in 1898 to a plan of issuing, in exchange for certificates and upon new business, a policy having some of the features of old line insurance, seems to have been fully justified by the state of the company's business. And the subsequent change to a policy with straight premiums and fixed indemnity was approved by the majority of the members upon proceedings had under the Minnesota Statute, and has resulted in a successful business and a considerable change of the members to the new and more stable plan. It does not appear that any certificate has been unpaid, nor is any failure shown to levy assessments required under the original articles."

The Supreme Court, in discussing the effects of the law of Minnesota under which the society was organized, said further:

> "In our view of the case the law of Minnesota did not impair the obligation of any contract, nor were the changes in the method and plan of this company beyond its corporate powers."

In the case of *Korn vs. The Mutual Assurance Society*, 6 Cranch (U. S.) 192, the society was incorporated by the legislature of Virginia in 1794. In 1805 the society discovered its country risks were proving much more costly than risks taken on town property. Accordingly, it adopted a by-law placing the town risks in one class at a given rate of assessment and the country risks in another class at another rate of assessment, and providing that a failure to pay assessments should suspend a member's right to insurance. The plaintiffs whose policies were transferred to the country class refused to pay the increased assessment on the ground that the by-law so changed the contract that they were no longer liable under it. The court, in denying the relief claimed, said:

"The liability of the members of this institution is of a two-fold nature. It results both from an obligation to conform to laws of their own making, as members of the body politic, and from a particular assumption or declaration which every individual signs on becoming a member. * * * 'We will abide by, observe, and adhere to the constitution, rules, and regulations which are already established or may hereafter be established by a majority of the assured, * * * or which are, or may hereafter be established by the president and directors of the society.' It would be difficult to find words of more extensive significance than these or better calculated to aid, explain, or enforce the general principle that a *majority of a corporate body must have power to bind its individuals.*"

"As to what is contended to be a material alteration in their charter, we consider it merely as a new arrangement or distribution of their funds; and *whether just or unjust, reasonable or unreasonable, beneficial or otherwise to all concerned, was certainly a mere matter of speculation,* proper for the consideration of the society, and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured.

Certainly the general submission which they have signed will cover their liability to submit to this alteration."

The question involved in the case last above cited was again brought before the Supreme Court of the United States in the case of *Society vs. Korn*, 7 Cranch (U. S.) 396, on the ground that the "former case" had merely established the continuance of the original contract, and that he was not liable for the increased assessment authorized by the change in the by-laws. The court said:

"* * * it is contended that the contract being complete between the parties, the insurers cannot add to the consideration to be paid for insurance. In general this doctrine is unquestionably correct, but peculiar circumstances except this from ordinary cases. This subject was considered in the quoted case decided between these same parties in February, 1810. It is there laid down, and on reflection we are confirmed in the opinion that in the capacity of an individual of the body corporate the defendants are bound by the by-laws of the society as far as is consistent with the nature of its constitution."

"The trial court" (Gaynor, J.) "held that the question was solely one of power * * *. Each member of the society is an insurer as well as an insured, and I think as an insurer he must be deemed to have contracted to pay his just and ratable share of the amount necessary to enable the defendant to keep its contract with its members and pay their dependents the stipulated sum, and the parties who have understood that changed conditions might necessitate a readjustment of rates, and hence that the society, under the reserved power to amend its by-laws assented to by the plaintiff, could make such readjustment."

Mock vs. Supreme Council Royal Arcanum, 121 App. Div. 474, 476, 477.

In the case of *Gaines vs. Supreme Council Royal Arcanum*, 140 Fed. 978, the court, in discussing the right of a corporation to modify the terms of a contract of corporate membership, said:

"It must be apparent that it is an extremely delicate question for the courts of any jurisdiction other than Massachusetts, the state of defendant's creation and the state of its domicile, to interfere by injunction with the internal regulation and management of the affairs of this benevolent association. The contract is, of course, founded not only on the certificate of membership, but in the properly adopted by-laws and regulations, or the laws of Massachusetts under which the association is incorporated, and it is obvious enough that the law of Massachusetts furnishes the rule for the decision of the question now up for disposition and all similar questions relating to this association and its powers and authority. If the court may interfere by injunction in a case like this it must be distinctly upon the closely drawn issue whether vested and constitutionally protected rights are being interfered with or impaired. If the courts of any state may exercise jurisdiction for such purposes outside of the state in which the defendant association was created and has its principal office and domicile, it is equally true that the courts of the forty-three or forty-four different states where members may be can exercise similar power and authority. If this were done it would speedily bring about such a situation as would make emphatic the proposition that the courts of any states other than Massachusetts should only exercise authority to interfere by injunction with the internal management and operation of the association on the clearest and most cogent grounds."

In the *Green case, supra,* the Supreme Court of the United States reached the conclusion that a corporation could modify the terms of the contract with the members only when it was in conformity with the provisions of the charter of the corporation as interpreted by the decisions of the courts of the state in which the corporation was chartered. Chief Justice White said in effect, in his opinion, that when the court of Massachusetts had determined what the power of the society was in reference to the changing of the contractual terms by the enactment of by-laws that that was binding upon the courts of other states, even

though the members resided in such other states; in effect, holding that when the member joined in some state other than Massachusetts his rights were to be detrmined by the charter of the corporation and its powers as interpreted by the courts of Massachusetts, the home state of the corporation.

The corporate powers of the petitioner are measured by the Acts of Illinois.

The legislature of Illinois has determined what is a fraternal beneficiary society. It has stated that such a society shall have a representative form of government and shall exercise the powers of a corporation. Petitioner is transacting business in Nebraska as a fraternal beneficiary society. When Nebraska permitted the defendant to transact business within its borders it thereby consented that this foreign corporation should exercise all of the powers conferred by its charter and the general laws appertaining thereto.

In the case of *Dartmouth College vs. Whitman*, 4 Wheat. 518, Dartmouth College objected to an act of the legislature of New Hampshire relating to its charter, claiming that the legislative act invaded the vested rights of the college. The college had been originally chartered by the Crown. The constitution of New Hampshire did not reserve to the legislature the right to amend laws relating to corporations which would affect the stockholders at the time of such enactment. The court reached the conclusion that inasmuch as the constitution of the state did not reserve the right to amend acts relating to corporations that the legislature did not have the power to interfere with vested rights of the stockholders and that the act so passed was invalid. In other words, the charter as originally granted was controlling and this could not be amended without the consent of the stockholders of the corporation.

In this case the contract provides that the member is to be bound by subsequently enacted by-laws, and in effect, By-law No. 66, relating to disappearance of members, is

the same as though written in the by-laws at the time Mixer became a member of the society, and the power of the society to enact such a by-law is determined by the laws of Illinois relating to fraternal beneficiary societies and the petitioner's by-laws as interpreted by the decisions of that state.

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created."
>
> Chief Justice Marshall in *Dartmouth College vs. Woodward*, 4 Wheat. 518.

> "Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the difficulties and disabilities annexed by the common law to insure institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to deprive all its powers from that act, and to be capable of exerting its faculties only in the manner in which that act authorizes."
>
> Chief Justice Marshall in *Head vs. Providence Ins. Co.*, 2 Cranch. 127.

> "But whatever may be the implied powers of aggregated corporations by the common law and the modes by which those powers are to be carried into operation, corporations created by statute must depend both for their powers and the mode of exercising them upon the true construction of the statute itself."
>
> Justice Story in *Bank of U. S. vs. Dandridge*, 12 Wheat. 64.

> "It may safely be assumed that a corporation can make no contracts and do no acts, either within or without the state which creates it, except such as are authorized by its charter, and those acts must also be

done by such officers or agents and in such manner as the charter authorizes, and if the law creating a corporation does not, by the true construction of the words used in the charter give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void. A corporation must no doubt show that the law of its creation gave it authority to make such contracts through such agents."

Chief Justice Taney in *Bank of Augusta vs. Earle*, 13 Pet. 519.

In the case of *North American Union vs. Johnson*, 142 Ark. 378, the *Knights and Ladies of Honor* was a fraternal insurance corporation organized under the laws of Indiana and licensed to do business in Arkansas. In April, 1916, it issued to one Richard T. Johnson its benefit certificate for the sum of $2,000. In August, 1916, the Knights and Ladies of Honor attempted to merge with the North American Union, appellant. The appellant is a fraternal insurance society organized under the laws of Illinois. It was never authorized to do business in Arkansas. The question arose as to whether the merger attempted was valid. It was proposed to transfer the members in the Knights and Ladies of Honor to the North American Union without a physical examination. The law relating to fraternal beneficiary societies in Illinois provided that no member could be admitted to membership without a physical examination. The court held that the laws of Illinois were controlling and that the Arkansas courts were compelled to follow the Illinois law. The court said:

"Therefore, under the laws of Illinois, as well as of the laws of appellant, medical examinations are required as a prerequisite to membership in fraternal benefit societies. A certificate issued without such medical examination is an *ultra vires* act upon the part of the corporation which renders such certificate not only voidable but wholly void and of no legal effect. Hence, neither party to such an alleged contract could be estopped by any acts done under it, from showing that the pur-

ported contract was in violation of the laws of the state."

The court in the case last above cited, follows and approves the rule announced in *Royal Arcanum vs. Green,* 237 U. S. 532, in the following language:

> "The rights of members of a corporation of a fraternal and beneficiary character have their source in the constitution and by-laws of the corporation and can only be determined by resort thereto, and such constitution and by-laws must necessarily be construed by the law of the state of its incorporation."

In the North American Union case, *supra,* it appeared that the merger had been held invalid by the courts of Illinois. While the decree was rendered by the Circuit Court of Illinois, although an inferior court, was nevertheless a court of general jurisdiction, and the court reaches the conclusion that, inasmuch as that decree was not appealed from, it was binding upon all parties to it . In disposing of that question the court said:

> "Appellant did not appeal from that decree but on the contrary, consented thereto. We, therefore, conclude that, under the laws of Illinois as expressed in her statute and declared by her courts, Johnson, at the time of his death was a member of appellant and a rightful holder of its policy of insurance, and that the beneficiary named therein is entitled to recover in this action unless Johnson had forfeited his right under the policy."

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state" implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home.

The theory of the constitution is that it applies to the public acts of the state as well as the decisions of the courts. When a corporation, organized under the laws of a given

state, goes into another state to transact business the public acts of the home state of the corporation and the charter of the corporation, are carried with it wherever it goes. Every contract that is entered into, whether in the home state or elsewhere, is dependent upon the authority of the public acts and the charter of the corporation. In relation to the power and authority of the corporation they must be given the same force and effect as in the home state.

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. It is not pretended that any judgment of the state of Ohio was disregarded by the courts of New York, but it is contended that full force and effect was not given to the constitution of the state of Ohio. This duty is as obligatory as the similar duty in respect to the judicial proceedings of that state."

Justice Brewer in *Smithsonian Institute vs. St. John*, 214 U. S. 19.

"* * * in respect to the faith and credit to be given by the courts of one state to the judgments of the courts of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another."

Chief Justice WAITE in *R. R. Co. vs. Wiggins Ferry Co.*, 119 U. S. 615.

"The constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken. Such is the Congres-

sional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. In other words, the local effect must be recognized everywhere through the United States."

Justice Brewer in *Hancock National Bank vs. Farnam*, 176 U. S. 640.

"If this were a case arising in the state of New York we should therefore follow the construction put upon the statute by the courts of that state. The circumstance that the case comes here from the state of Florida should not leave the statute open to different construction. It would be an anomaly for this court to put one interpretation on a statute in a case arising in New York and a different interpretation in a case arising in Florida."

Justice Woods in *Flash vs. Conn.*, 109 U. S. 371.

Corporate necessity recognizes the controlling effect of the law of the home state of the corporation.

Royal Arcanum vs. Green, 237 U. S. 531.

The provisions of the Constitution and of the Act of Congress by which the judgments of one state are to have faith and credit given them in another state establishes a rule of evidence rather than of jurisdiction.

The Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America*, 296 Ill. 104, reached the conclusion that by-law No. 66 was valid and it was well within the powers of the corporation to enact such a by-law. The question before the court in this case is the same as that involved in the Steen case, being an interpretation of the powers of the corporation. If the court failed to give due credit to the judgment entered in the Steen case on the question of the power of the society to enact a by-law then the court would fail to give full faith and credit to the acts and judgment of the courts of Illinois, and this would involve a rule of evidence.

"The provisions of the constitution and of the act of congress by which the judgments of one state are to have faith and credit given to them in another state establishes a rule of evidence rather than of jurisdiction. They do not affect the jurisdiction of the court in which the judgment is rendered but that in which it is offered in evidence."

Wisconsin vs. Pelican Ins. Co., 127 U. S. 265.

There is no vested right in a rule of evidence, and parties may by contract change an established rule of evidence and provide that a different rule shall apply in determining controversies that may arise between parties to the contract.

The courts generally have recognized that parties may contract to change the established rules of evidence and provide that a different rule may obtain.

In the case of *Moudou vs. N. Y., N. H. & Hartford R. R. Co.*, 223 U. S. 1, the court said:

"Congress did not exceed its power to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce, by enacting the Employers' Liability Act of April 22, 1908, which abrogates the fellow servant rule, extends the carrier's liability to cases of death, and restricts the defenses of contributory negligence and assumption of risk, since no one has any vested right under any rule of the common law, and the natural tendency of such changes is to promote the safety of the employees and to advance the commerce in which they are engaged."

In the case of *Mobile, Jackson & P. C. R. R. Co. vs. Turnispeed*, 219 U. S. 35, the court said:

"Neither the equal protection of the laws nor due process of law is denied by the Mississippi code 1916, Section 1985, under which an action against railway companies for damage done to persons or property, proof of injury inflicted by the running of the locomotive or cars is made prima facie evidence of negligence."

In discussing the question in the case last above cited, the court said:

> "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue, is but to enact a rule of evidence and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both criminal and civil cases, abound, and decisions upholding them are numerous."

In the case of *Roeh vs. Business Men's Protective Association of Des Moines,* 164 Ia. 199, a provision of a certificate of a mutual assessment society provided that the society should not be liable for any injury or death caused by the discharge of a firearm unless the accidental character thereof be established by the testimony of one eye witness other than the member. The court, in relation to the validity of this provision, said:

> "It was to remove the presumption of accident and although not necessarily requred that the witness should have seen the exact manner of the discharge, it did require his presence at or near the scene and his direct observation of such facts and circumstances connected with the immediate transaction as of themselves would indicate that the shooting was accidental."

And in discussing further inrelation to the validity of this proposition, the court said:

> "A provision in a benefit certificate of a mutual benefit association providing that the association shall not be liable for death caused by the discharge of a firearm unless the accidental character thereof be established by one witness other than insured, is not contrary to public policy in that it attempts to modify and control the procedure of courts of justice."

In the body of the opinion of the case last above cited, as to the validity of this by-law, the court said:

> "It is contended that the by-law is contrary to public policy, in that it attempts to modify and control

the procedure of courts of justice. It does not in any manner deprive courts of their jurisdiction, but simply provides a rule of evidence or a condition precedent or subsequent to a right of recovery. We see nothing in the by-law contrary to public policy. Contracts relating to procedure have frequently been sustained. The parties may, by contract, fix their own statute of limitations. See *Harrison vs. Insurance Co.*, 102 Ia. 112 (71 N W. 229; 47 L. R. A. 709). They may also specify the terms and conditions of liability, even though, without the contract, recovery might be had. *Griswold vs. Railroad*, 90 Ia. 265; 57 N. W. 843; 24 L. R. A. 647. A contract may be made waiving a jury trial; *Columbia Bank vs. Okely*, 4 Wheat. 235; 4 L. Ed. 559. A by-law much like the one now before us was applied in *National Ass'n. vs. Ralstin*, 101 Ill. App. 192; *Kelly vs. Supreme Council*, 46 App. Div. 79; 61 N. Y. Sup. 394. A contract providing a rule of evidence was also upheld by this court in *Russ vs. The War Eagle*, 14 Ia. 363. The legislature has not spoken upon this subject and until it does so, we see nothing inimical to public policy in the by-law now before us.

"The rule of evidence established by this by-law is for the mutual benefit of all the million members of this society. The insured had the benefit of this agreement as well as all other members, and his beneficiaries must share its burdens. Parties have a right to agree as to what proof of death shall be furnished before the policy is payable. Appellee, as a legal entity, has no interest in this matter apart from its membership because it is a society organized not for profit."

Steen vs. Modern Woodmen of America, 296 Ill. 104.

If the legislature has not limited the charter powers of foreign beneficiary societies, the charter as interpreted by the courts of the home state is controlling.

In he cases of *Thomas vs. Matthiessen*, 232 U. S. 221; *National Mutual Building & Loan Association vs. Brahan*, 193 U. S. 635, and *New York Life Insurance Co. vs. Cravens*, 178 U. S. 389, the statutes of the domiciliary state were rendered nugatory by contrary legislation in the states in which

the corporations were transacting business, it being held that the corporations might be deemed to have accepted the contrary legislation by coming into the state.

The legislature of Nebraska has enacted no laws invalidating the provisions set forth in By-Law 66; that is, the legislature has not enacted any law which makes invalid a contract relating to a rule of evidence.

In the cases of *Dworak vs. Supreme Lodge*, 101 Neb. 297; *Dolan vs. Supreme Council*, 152 Mich. 266; *Weiditschka vs. Maccabees*, 188 Ia. 183, and *Dennis vs. Modern Brotherhood of America*, 119 Mo. App. 209, conflicting statutes between the domiciliary state of the beneficiary society and the state where doing business were involved, and in each case the court reached the conclusion that the statutes of the state where the societies were doing business controlled rather than the domiciliary states of the societies.

If the legislature of Nebraska had not enacted a statute which provided those only who could take as beneficiaries, then in the Dworak case, *supra*, the statutes of Iowa would control, but inasmuch as the legislature of Nebraska provided the class of beneficiaries only who could take it nullified the statute law of Iowa which provided who could be beneficiaries.

In the cases of *McElroy vs. Insurance Co.*, 84 Neb. 866, and *Rye vs. New York Life Insurance Co.*, 88 Neb. 707, the insurance companies contended that the policies of insurance had been forfeited on account of the failure to pay premiums. The plaintiffs contended that there were no forfeitures because no notices had been served that forfeitures would be declared in conformity with the statute of New York. The question then arose as to whether the statute of New York was controlling in Nebraska. The Nebraska court reached the conclusion that the New York statute was not controlling for the reason that it did not have any extra-

territorial application, it being confined to the policy-holders residing within the state of New York. The natural inference is that the New York statute would have controlled if it applied to all policy-holders alike.

Similar questions were decided in the case of *Mutual Life Insurance Co. vs. Cohen,* 179 U. S. 262, and related to the New York statute. The same question was disposed of in the case of *Mutual Life Insurance Co. vs. Hill,* 193 U. S. 551. The Supreme Court of the United States in the two cases above mentioned, reached the conclusion that the statute of New York did not have any extraterritorial application, that it only applied to policy-holders within that state. Justice Brewer, in the Cohen case, in discussing this question, said:

> "These considerations led to the conclusion that the statute of New York, directed as it is to companies doing business within the state, was intended to be, and is in effect, applicable only to business transacted within that state."

Justice Brewer, discussing another phase of the same question in the Cohen case, said:

> "Further, it may be noticed that even if the language justifies a broader construction it may well mean that only such laws of the state of New York as are intended to and do change the charters of the companies, or are intended to have extraterritorial application, should be considered a part of the policy."

In this case all by-laws adopted by petitioner enter into and become a part of the contract between petitioner and its members. The by-laws affect the members wherever situated and the very nature of the corporation impels the conclusion that its power to enact by-laws must be lodged in its charter, based upon the statute under which the corporation is incorporated. If petitioner had the power under its charter and the statutes of Illinois to enact By-law 66

then the District Court of Dakota County, by sustaining the demurrer to petitioner's answer, and the Supreme Court of Nebraska by affirming this judgment, fail to give full faith and credit to the decision and judgment of the Supreme Court of Illinois in the case of *Steen vs. Modern Woodmen of America.*

For the foregoing reasons we respectfully submit that the petition for a Writ of Certiorari should be granted.

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